Kellogg's Snack Company *and* Local 560, International Brotherhood of Teamsters, AFL–CIO. Case 2–CA–36270

May 31, 2005

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND SCHAUMBER

On February 25, 2005, Administrative Law Judge Raymond P. Green issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed an answering brief.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions[2] and to adopt the recommended Order as modified below.[3]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Kellogg's Snack Company, Langhorne, Pennsylvania, its officers, agents, successors, and assigns shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 2(a).

"(a) Furnish to the Union the information requested in the letters sent by the Union dated March 4, April 13, and April 27, 2004."

2. Substitute the attached notice for that of the administrative law judge.

Dated, Washington, D.C. May 31, 2005

_____
Robert J. Battista, Chairman

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Wilma B. Liebman, Member

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Peter C. Schaumber, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT do anything that interferes with these rights. More particularly,

WE WILL NOT refuse to furnish relevant information to Local 560, International Brotherhood of Teamsters, AFL–CIO in connection with a grievance filed on February 12, 2003.

WE WILL NOT in any like or related manner, interfere with, restrain, or coerce employees in the exercise of their Section 7 rights.

WE WILL furnish to the Union the information requested in the letters sent by the Union dated March 4, April 13, and April 27, 2004.

KELLOGG'S SNACK COMPANY

[1] The Respondent's defense is that it was willing to concede at arbitration the substance of the Union's grievance, i.e., that it uses common carriers rather than unit drivers to deliver some of its products to independent distributors. Thus, the Respondent argues, the Union did not need the information that it requested in its three letters. Chairman Battista finds that this defense is based on a faulty underlying premise—the Respondent's assertion that the disputed deliveries all originated from its bakeries, rather than from its New York distribution centers where the unit drivers work and, as such, involved nonunit work. In the Chairman's view, this argument misperceives the purpose of the Union's information request. The Union needs the requested information to determine for itself whether, as the Respondent claims, the disputed deliveries originated from its bakeries. The Union is not required to accept, at face value, the Respondent's assertion on this point. The requested information shows where the disputed deliveries originated from and, armed with this information, the Union would be able to decide whether it has a meritorious grievance worth pursuing to arbitration, or a nonmeritorious grievance that it should drop. Chairman Battista concludes that, under *NLRB v. Acme Industrial Co.*, 385 U.S. 432, 438–439 (1967), the requested information is relevant to this inquiry and must be provided.

[2] Chairman Battista and Member Schaumber note that the Respondent does not argue that the Union's requests for information should be deferred to the parties' contractual grievance-arbitration procedures. Thus, they do not pass on this issue. Compare *SBC California*, 344 NLRB No. 11 fn. 3 (2005).

[3] We modify par. 2(a) of the judge's recommended Order, and substitute a new notice, correcting the date of one of the Union's letters requesting information. The correct date is March 4, rather than March 3, 2004.

Dharma Wilson, Esq., for the General Counsel.
Irving L. Hurwitz, Esq., for the Respondent.
Paul A. Montalbano, Esq., for the Union.

DECISION

STATEMENT OF THE CASE

RAYMOND P. GREEN, Administrative Law Judge. I heard this case in New York, New York, on November 15, 2004. The charge was filed on May 21, 2004, and the complaint was issued against the Respondent on August 27, 2004.[1] In substance, the complaint alleges that since on or about February 11, 2004, the Respondent has failed to furnish to the Union certain information, to wit:

(a) Bills of lading from certain named carriers; and

(b) Invoices identifying the shipper, the name of the product, and the amount of the product and the date of delivery relating to certain named carriers.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed, I make the following

FINDINGS OF FACT

I. JURISDICTION

The parties stipulated that the Respondent, a corporation, is engaged in the manufacture and distribution of food products and that annually, it purchases goods valued in excess of $50,000 that are delivered directly to its New York facilities from outside the State of New York. I therefore conclude that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. The parties also agree and I find that Local 560, International Brotherhood of Teamsters, AFL–CIO is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

The Respondent is engaged in the manufacture and sale of prepared foods such as cookies and crackers. It and the Union have had a collective-bargaining relationship for at least 20 to 25 years. In this regard, although the Company has multiple facilities nationwide, Local 560 represents the drivers and warehousemen at two distribution centers in New York State. One is in Orangeburg, New York, and the other is in Long Island, New York.[2]

The most recent collective-bargaining agreements covering these two facilities (each is covered by a separate but largely identical agreement), ran from June 12, 2001 to June 12, 2004. Bargaining for new contracts began sometime in June 2001 and no new contracts have been reached.

The products that are handled at the two distribution centers are food items such as cookies and crackers that are baked at various facilities in the United States such as Macon, Georgia, etc. The goods are delivered from the manufacturing facilities to distribution centers which service specified geographic areas and are then delivered to customers, such as large supermarkets, from these centers. The two centers involved in the present case service New York City, Long Island, and New Jersey. The employees who handle the goods at the centers are warehousemen and the drivers who deliver the goods to customers are drivers. Local 560 represents both of these categories of employees.

There are, however, a category of smaller retailers who indirectly purchase the Respondent's goods such as grocery stores, bodegas, etc. And as to these, the Respondent has decided that it would not be efficient to deliver its products directly to them from its distribution centers by its own drivers. Accordingly, at some point in the past, the Respondent arranged to sell its products to various independent companies (wholesalers), who in turn sold and delivered the goods to these kinds of retailers. Examples of these kinds of companies are W.B. Brown, Condel, and Premiere Snacks.

One of the questions in this case is how do cookies get to bodegas and grocery stores?

The parties agree that pursuant to the contract, if the goods come into either distribution center they must be handled by and delivered by Local 560 members. That is, the cookies are driven from a center to the wholesaler in a truck owned by the Respondent and driven by a driver employed by the Respondent. In this regard, the collective-bargaining agreements at Article 16 state:

> The Employer agrees to respect the jurisdictional rules of the Union and shall not direct or permit their employees or persons other than the employees in the bargaining unit here involved to perform work which is recognized as the work of the employees in said unit. Deliveries shall not be made by sales employees except in cases of extreme emergencies. . . .

At various times since about 1996, there have been occasions when the Union has suspected that wholesalers such as W.B. Brown have been allowed to use their trucks and drivers to pick up goods at the distribution centers. These situations have generated grievances, settlements, and side letters. In a memorandum agreement dated June 11, 1998, the parties agreed that:

> It is understood that the deliveries to non-DSD customers will be made by the bargaining unit unless under unusual circumstances beyond the control of Keebler Foods Company. Venders such as Condel or D.W. Brown may make an occasional pickup at the Keebler facilities. It is understood that prior agreements not in existence regarding these vendors remain in force. In these limited instances there shall be no violation of the CBA for customer pickups due to these limited circumstances.

On June 12, 2001, in connection with the most recent collective-bargaining agreement, the parties signed a letter agreement which essentially prohibited wholesalers from making pickups at the Long Island distribution center. This stated:

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[1] The correct name of the Employer is Kellogg's Snack Company. Accordingly the caption of this case is amended to reflect the correct name.

[2] Actually the Union has represented these employees when they were employed by predecessor companies. One was Sunshine and the other was Keebler. The most recent owner is Kellogg's Snack Company.

> The Company agrees that all deliveries to step-van sales mini warehouses in the Long Island Distribution service area will be delivered by bargaining unit employees and step-van sales employees will not be permitted to pick up product from the Distribution Center.

Nevertheless, the Company asserts that historically, this is not the only way that the cookies go to the smaller stores. It asserts that for a long time, even before 1996, there were occasions when cookies were delivered directly to the wholesalers from the bakeries by way of common carrier. It asserts that in those circumstances, the cookies and crackers never went into the distribution centers at all and therefore were never handled by or driven by Local 560 employees. As to this contention, there is probably some dispute between the parties, either as to the past practice or the extent thereof. Luckily, I am not the person called upon to decide that dispute which is pending before an arbitrator.

On February 12, 2003, the Union filed a grievance alleging that the Respondent violated article 16 in that goods were winding up at wholesalers without having been driven there by Local 560 drivers who were employed at the two distribution centers. The grievance demanded that the Company "Cease and Desist." As in past grievances of a similar nature, it is reasonable to assume that the Union would seek backpay for any loss of earnings suffered by affected drivers.

Also on February 12, 2003, the Union filed a request for arbitration of the grievance with the New Jersey State Board of Mediation. In bringing the grievance, the testimony was that various union drivers had seen product at the warehouses of the wholesalers that they knew were not delivered by Local 560 drivers.

On January 13, 2004, Paul Montalbano, the Union's attorney served a subpoena upon the Respondent in anticipation of an arbitration hearing scheduled to take place on February 11, 2004 before Michael Berzansky. Without going into too much detail, suffice it to say that he was seeking documents covering a 3-year period of time to determine the past practice and the extent to which the Respondent was having products delivered to New York area wholesalers by means other than using the drivers who were employed at the two distribution centers. The purposes of the subpoena were (1) to prove that the Company was doing this and (2) to establish the extent to which it was done and therefore the extent of damages.

Shortly before the hearing, the Company's representatives asked to postpone the hearing and sit down and see if the matter could be settled. The Union agreed and the parties met on February 11, 2004. According to Montalbano, the Company's representatives stated that they did not understand what the problem was and Montalbano said that the Union would be able to demonstrate that the Respondent was causing deliveries to be made to the area wholesalers by using common carriers instead of Local 560 drivers.

On March 4, 2004, Montalbano wrote to the Company's director of labor relations, Tom Rezek, and stated:

> Consistent with our discussions of February 11, 2004, I have been able to prepare a listing of carriers and dates of violations which are the subject matter of the Union's arbitration. Please note that the Union continues to obtain additional documentation which we believe evidences the violation. It is requested that you please conduct an investigation concerning each of these vendors during the relevant time period as specified in my schedule and provide information in that regard.

The letter's attachment lists alleged deliveries by specified common carriers during certain months in 2003 and 2004 to Premier Snack Distribution in Garden City Park, New York. (Presumably alleged as a violation of the contract covering the Long Island Distribution Center employees.) Similarly, it lists deliveries made to W.B. Brown by various common carriers during certain months in 2002 to 2004. (Presumably alleged as a violation of the Orangeburg contract.)

When the Company did not respond, Montalbano wrote another letter on April 13, 2004. This stated:

> By my letter of March 4, 2004, I provided to you a schedule listing carriers which we believe made deliveries in violation of the collective bargaining agreement. I provided not only the carriers but the month in which we believe the violations to have occurred.
>
> During our conversation . . . on February 11, 2004, I advised that I was seeking to receive copies of the bills of lading and related invoicing identifying the shipper, the destination, the nature of the product, the amount of product and the date of delivery. I remind you that I need a response containing information to that request.
>
> Since that time, I have received additional information indicating a continuation of the violation. It is requested that you please provide similar invoice information concerning the following carrier: New England Motor Freight, March 2004, Master Bill of Lading #14314684M.
>
> I also seek information concerning carrier Joseph's Express, March 2004, including, but not limited to Order Nos. 62895980, 62895991, 62895981.

Still not getting any response from the Company, Montalbano sent a letter dated April 27, 2004. This stated:

> By my letter on March 4, 2004 and April 13, 2004, I requested that you provide Local 560 with information concerning the above reference grievance. To date I have not received any response containing the information, or in the alternative any reply with a question as to any uncertainties you may have concerning the Union's request.
>
> Please be advised that the Union has learned of other questionable shipments in particular involving U.S. Express shipped on February 7, 2004 and by overnight delivery company shipped on March 24, 2004 and April 2, 2004. As you have probably seen under separate cover, the Union has filed a supplemental grievance concerning this issue by grievance submitted on April 12, 2004. This problem is continuing and it appears the Company is not giving it sufficient time and effort. Please provide true copies of the shipping invoices on each of these additional shipments.
>
> If the requested information is not forthcoming . . . I will have no alternative but to file an Unfair Labor Practice charge. . . .

As the Company did not comply with the above requests, the charge was filed and this case has come to me.

I note that both the Union and the General Counsel state that they are not seeking to have the Board compel the Respondent to furnish it with all of the documents and information sought in the arbitration subpoena that is dated January 13. In this regard, Montalbano states that the subpoena, which under New Jersey law requires production of documents at the opening of an arbitration hearing, can be enforced by the New Jersey Superior Court. (Assuming that the arbitrator finds that the material is relevant.)

What is sought in this unfair labor practice case is the production of the particular documents requested in Montalbano's letters of March 4, April 13 and 27. Although the letter requests are different from the subpoena, Montalbano agrees that the documents sought in the three letters are, in fact, a subset of the information sought by the subpoena. That is, if the subpoena were to be enforced by a New Jersey Court, the information sought by the letters would be encompassed by the subpoena and any order compelling compliance.

The Company asserts that it decided not to furnish the information because, in its view, the information sought was not relevant to any legitimate grievance that the Union could have brought under the terms of the contract. It's witness testified that after reviewing the information sought, it was discovered that the deliveries that the Union was contending to be a violation of article 16 were not deliveries which went through the distribution centers but were deliveries which went by common carrier, directly from the manufacturing facilities to the wholesalers such as W.B. Brown. The Company's legal position is that because such deliveries are consistent with a past practice, the work that the Union argues should be "preserved" for its members was never going to be performed by its members because the products were never going to be delivered to the distribution centers. Moreover, the Respondent contends, that even if the information sought could arguably be deemed relevant to the grievance, it will concede to the arbitrator that it has used common carriers, not Local 560 drivers, to transport goods to wholesalers when it has chosen to deliver them directly from the bakeries.

Thus, the Company argues that unlike the past grievances, settlements, and side agreements, the situation in the present case does not involve a situation where a wholesaler was using its own truck and driver to pick up and deliver cookies from the distribution centers. Instead, it argues that the situation here is that the deliveries were made directly to the wholesalers from the bakeries and were never intended to go through either distribution center.

In response, the Union argues that even if this were true, if the Company was allowed to deliver goods directly to the wholesalers and thereby bypass the distribution centers, it would be diverting bargaining unit work away from Local 560 members and therefore would constitute a violation of article 16 of its collective-bargaining agreement. Moreover, despite the Company's assertion that it will admit that it has caused products to be delivered directly from bakeries to wholesalers, the Union argues that the specific information would still be needed in order to establish the amount of work lost and therefore the amount of damages. As to the last claim, the Respondent argues that information for that purpose would only be relevant if and when the arbitrator rules in favor of the Union on the merits of the dispute. (I imagine that the Respondent contemplates that the arbitrator will bifurcate the hearing and reserve a decision on damages if he finds that the Company breached the agreement.)

It is not for me to decide who is right about the underlying merits of the grievance regarding the interpretation of the collective-bargaining agreement. I have not been given the task of interpreting the extent of the prohibitory provisions of article 16 and that question is presently before an arbitrator.

III. ANALYSIS

Where information is sought for the purpose of evaluating and processing a grievance, the legal test is whether the information is relevant to the grievance. In this respect, the determination of relevancy is made based on a liberal, discovery type of standard. *NLRB v. Acme Industrial Co.*, 385 U.S. 432, 437 (1967); *Knappton Maritime Corp.*, 292 NLRB 236 (1985). Moreover, the fact that the information sought may tend to disprove a grievance is as equally relevant as those situations where the information would tend to support a grievance. This is because the process of resolving grievances is best served by the disclosure of information which would tend to resolve grievances one way or the other, at the earliest stage of the procedure and not burden the parties with unwarranted arbitrations. *NLRB v. Acme Industrial Co.*, supra, *Square D Electric Co.*, 266 NLRB 795, 797 (1983); *Ohio Power Co.*, 216 NLRB 987, 991 (1975).

In the present case the Union and the Respondent are arguing about the meaning of article 16 of the collective-bargaining agreement and whether or not this would prohibit the Company from making deliveries, by drivers other than the union represented drivers employed at the two distribution centers. It also is obvious that the information requests were all related to the grievance/arbitration proceeding and the discussions to settle the grievance. The information was not sought in connection with the bargaining for a new contract that commenced in June 2004.

While I am not being asked to resolve the contract question; it having been placed before an arbitrator, it is clear to me that the information sought by the Union in the three letters would be relevant to show if the alleged deliveries were made, the extent to which these deliveries were consistent with or inconsistent with the Company's practice over a 3-year period and the extent to which drivers lost income as a result of the practice.

Obviously, if the arbitrator concludes that the contract does not prohibit the Company from using common carriers to deliver its products directly from its bakeries to the wholesalers, then the information sought would ultimately be useless to the Union. *But it is not for me to prejudge the outcome of the arbitration case*. And given the Union's argument that the contract clause would prohibit the Company from diverting bargaining unit away from the distribution centers, the information sought would be relevant to support its contentions in the arbitration

case or in any discussions to resolve the dispute short of litigation.

I note that it could be argued that the Board should defer this case to the arbitration process because the information sought via this unfair labor practice case is a subset of the information subpoenaed by the Union in the arbitration case. Nevertheless the Board has consistently refused to defer its own procedures to the arbitration process in cases involving information requests. *Shaw's Supermarkets, Inc*. 339 NLRB 871 (2003); *General Dynamics Corp*., 270 NLRB 829 (1984). Moreover, the Respondent in its brief does not argue for deferral.

The Company contends that the information is not necessary, at least at the present time, because it intends to concede to the arbitrator, the practice complained of by the Union and let the arbitrator decide first whether the practice is violative of the contract. In the Company's view, the information could only be relevant if the arbitrator decides against it and then only for the purpose of deciding the amount of lost pay.

With respect to this contention, it seems to me that if the information is relevant to the grievance (or to any interim bargaining to resolve the grievance), then its disclosure should not depend on the procedural state of the grievance/arbitration process. If that were the case, then the Board would get bogged down in trying to figure out not only if information was relevant, but also in determining at what point in the grievance process, a party is required to disclose relevant information. And I should note, by the way, that information which may be relevant to a *potential* grievance has to be turned over even before any grievance is filed. As the Court pointed out in *NLRB v. Acme Industrial Co.*, supra,

> Far from intruding upon the preserve of the arbitrator, the Board's action was in aid of the arbitration process. Arbitration can function properly only if the grievance procedures leading to it can sift out unmeritorious claims. For if all claims originated as grievances had to be processed through to arbitration, the system would be woefully overburdened.

In light of the above, it is my opinion that the information sought in the Union's requests dated March 3, April 13 and 27, 2004, were relevant for the purpose of bargaining or potentially enforcing the provisions of the collective-bargaining agreement. Accordingly, it is my conclusion that the Respondent has violated Section 8(a)(1) and (5) by refusing to furnish this information.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[3]

ORDER

The Respondent, Kellogg's Snack Company, its officers, agents, successor, and assigns, shall

1. Cease and desist from

(a) Refusing to furnish relevant information to Local 560, International Brotherhood of Teamsters, AFL–CIO in connection with a grievance filed on February 12, 2003.

(b) In any like or related manner, interfering with, restraining or coercing employees in the exercise of their Section 7 rights.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Upon request, furnish to the Union the information requested in the letters sent by the Union dated March 3, April 13 and 27, 2004.

(b) Within 14 days after service by the Region, post at its facilities in Long Island and Orangeburg, New York, copies of the attached notice marked "Appendix."[4] Copies of the notice, on forms provided by the Regional Director for Region 2, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facilities involved in these proceedings, or sold the business or the facilities involved herein, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondents at any time since March 4, 2004.

(c) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. February 25, 2005

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutual aid or protection

[3] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[4] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

To choose not to engage in any of these protected concerted activities.

WE WILL NOT refuse to furnish relevant information to Local 560, International Brotherhood of Teamsters, AFL–CIO in connection with a grievance filed on February 12, 2003.

WE WILL NOT in any like or related manner, interfering with, restraining, or coercing employees in the exercise of their Section 7 rights.

WE WILL upon request, furnish to the Union the information requested in the letters sent by the Union dated March 3, April 13 and 27, 2004.

KELLOGG'S SNACK COMPANY